IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES STEVEN MCPHERSON, Appellant.	No. 39163-5-II UNPUBLISHED OPINION

Hunt, J. – James Steven McPherson appeals his standard-range sentence for his second degree escape conviction based on his January 1999 failure to return from work release while he was serving time in the Thurston County jail for two gross misdemeanor convictions. He argues that his sentence violates equal protection because his offender score and resulting standard range were higher than they would have been had he been serving time for a felony conviction when he failed to return from work release. We affirm.

FACTS

In January 1999, James Steven McPherson was serving sentences in the Thurston County Jail for two gross misdemeanor convictions; he was participating in a work release program. On January 14, he checked out of the jail for a job interview and failed to return.

The State charged him with second degree escape, under former RCW 9A.76.120(1)(a) (1995),[1] and issued an arrest warrant. After his arrest in 2008, McPherson was convicted of

[1] Former RCW 9A.76.120 provided:

second degree escape following a stipulated facts bench trial. His two prior felony convictions yielded an offender score of two and a 4- to 12-month standard sentencing range.[2] If McPherson had been convicted of willful failure to return to a work release facility while in custody for a felony, rather than facing escape charges for absconding while serving time for misdemeanor convictions, his sentencing consequences would have been less severe under the sentencing scheme in place in 1999:[3] (1) His prior non-escape felony convictions (forgery and theft) would not have counted in his offender score, (2) his offender score would have been zero points, and (3) his standard sentencing range would have been one to three months.[4]

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(1) A person is guilty of escape in the second degree if:

(a) He or she escapes from a detention facility;

(b) Having been charged with a felony or an equivalent juvenile offense, he or she escapes from custody; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, he or she leaves the state of Washington without prior court authorization.

(2) Escape in the second degree is a class C felony.

[2] Former RCW 9.94A.310(1) (1998) (effective Jan. 1, 1999); former RCW 9.94A.320 (1998) (second degree escape is a level III offense); former RCW 9.94A.360(14) (1998) (effective Jan. 1, 1999) ("If the present conviction is for . . . Escape 2, [former] RCW 9A.76.120, count adult prior convictions as one point and juvenile prior convictions as 1/2 point.").

[3] If McPherson had failed to return from work release to the jail while in custody for a *felony* offense in 1999, the State would have charged him with willful failure to return to a work release facility under former RCW 72.65.070 (1967) (repealed in 2001, *see* Laws of 2001, ch. 264 § 7), rather than second degree escape under former RCW 9A.76.120). *State v. Hall*, 104 Wn.2d 486, 492, 706 P.2d 1074 (1985); *State v. Danforth*, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982) (State must charge state work release "prisoner" with more specific offense under former RCW 72.65.070 rather than general escape offense).

[4] Former RCW 9.94A.310(1); former RCW 9.94A.320 (willful failure to return from work release is a level III offense); former RCW 9.94A.360(13) ("If the present conviction is for . . . Willful Failure to Return from Work Release, [former] RCW 72.65.070 . . ., count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile

Based on this disparity, McPherson requested an exceptional sentence below the standard range. He argued that (1) a standard-range sentence for second degree escape would be disproportionate to the sentence he would have received for the same act if he had been serving time for a felony rather than for misdemeanors, and (2) the trial court could consider this sentencing disparity as a mitigating circumstance. Acknowledging that the trial court could take this sentencing disparity into account, the State requested a six-month sentence, rather than the high-end standard range sentence it would have otherwise requested, because of the significant length of time McPherson had been in the community following his escape.

The trial court rejected McPherson's exceptional sentence request and sentenced him to six months of confinement. McPherson appeals his sentence.

ANALYSIS

McPherson's sole argument on appeal is that the disparity between sentences for those who failed to return from work release while serving a felony sentence and those who failed to return from work release while serving a misdemeanor sentence violated equal protection under the Fourteenth Amendment[5] because there is no reasonable justification for making a felony-based sentence shorter than a misdemeanor-based sentence. This argument fails.

I. Standard of Review

The equal protection clause of the Fourteenth Amendment requires that persons similarly situated with respect to a legitimate purpose of the law be treated similarly. *State v. Shawn P.*,

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prior escape convictions as 1/2 point.").

[5] U.S. Const. Amend. XIV, § 1. McPherson does not argue that this disparity violates equal protection under the state constitution.

122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993).

> Equal protection is denied if a valid law is administered in a way that unjustly discriminates between similarly situated persons. Before [we] will scrutinize an equal protection claim, the defendant must establish that he is situated similarly to others in a class.

Harris v. Charles, 151 Wn. App. 929, 936, 214 P.3d 962 (2009) (citing *State v. Handley*, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990)).

The classifications at issue here are (1) misdemeanants with prior convictions for non-escape felonies who fail to return from work release, and (2) felons with prior convictions for non-escape felonies who fail to return from work release. Physical liberty is the interest at stake. When a statute involves a physical liberty interest but does not involve a suspect class, no fundamental right is threatened. *Harris*, 151 Wn. App. at 937 (citing *State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997)). Accordingly, as both parties agree, we review the legislative classifications at issue here under the rational basis test. *Manussier*, 129 Wn.2d at 673.

The rational basis test requires that the challenged law must serve a legitimate state objective, that the law must not be wholly irrelevant to achieving that objective, and that the means must be rationally related to the objective. *Manussier*, 129 Wn.2d at 673. The legislature need not adopt the best means to achieve the objective; rather, the legislature has broad discretion in how it pursues its legitimate goals. *Manussier*, 129 Wn.2d at 673. As the person challenging the law, McPherson must establish that the legislature's classifications are purely arbitrary. *Manussier*, 129 Wn.2d at 673. In this he fails.

II. Rational Basis

By definition, a felony is more serious than a misdemeanor.[6] Arguably then, the legislature might try to deter felons from escaping by imposing harsher penalties than for misdemeanant escapees. At the time of McPherson's escape, felons and misdemeanants with identical offender scores were subject to the same standard range sentences for escape: one to three months if their offender scores were zero and 51 to 68 months if their offender scores were nine or more. Former RCW 9.94A.310(1) (1998); former RCW 9.94A.320 (1998). But their offender scores, from which these standard sentencing ranges derived, were different: Former RCW 9.94A.360(13) and (14) (1998) (effective Jan. 1, 1999) provided that a misdemeanant's offender score included all prior offenses whereas a felon's offender score was sometimes lower because it included only prior escape convictions.[7]

Nevertheless, McPherson fails to show that other considerations do not justify the statutory sentencing differences between felon and misdemeanant escapees. For example, he fails

[6] *See* RCW 9A.04.040(2), which provides:

> A crime is a felony if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year. A crime is a misdemeanor if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for no more than ninety days. Every other crime is a gross misdemeanor.

[7] For example, if McPherson had been a felon, his offender score would have been zero, rather than two, and his resulting standard range would have been one to three months, instead of four to twelve months. Former RCW 9.94A.310(1). At the extreme, however, a felon with nine or more prior felony convictions, none of which were for escape, would be exposed to a one- to three-month standard range, while a misdemeanant would be exposed to a 51- to 68-month standard range. Former RCW 9.94A.310(1). Such was not the case, however, for McPherson.

to show that a felon would not receive additional Department of Corrections (DOC) penalties for his escape, such as prison disciplinary infractions, which could reduce his earned early release from his original felony sentence, thereby extending his prison time considerably.[8] This type of offsetting factor could have influenced the legislature's decision to expose escaped felons to shorter sentences for their escapes in contrast with escaped misdemeanants. Thus, McPherson has not shown that there was no rational basis for the felon-misdemeanant offender-score sentencing distinction he challenges in this appeal.[9] *See Harris*, 151 Wn. App. at 937-39 (rational basis exists for treating misdemeanants differently from felons with respect to credit for time served while on electronic home monitoring, in part because those serving time for felonies already face higher penalties and because requiring identical credit for time served could result in misdemeanants avoiding serving any jail time).

III. No Showing of Legislative Oversight

[8] When McPherson escaped in 1999, DOC could sanction prisoners subject to DOC jurisdiction who failed to return with an additional penalty in the form of a serious infraction for escape, former WAC 137-28-260 (550) (1997) or for committing any felony, former WAC 137-28-260(507) (1997), which could result in the loss of earned early release credits. Former WAC 137-28-350(1)(l) (1997).

[9] McPherson also asserts that the legislature's 2001 repeal of former RCW 72.65.070 implies that the legislature recognized that the different sentencing consequences for escape violated equal protection. Laws of 2001, ch. 264 § 7. But he cites no authority to support this argument, and his assertion that this was the legislature's motivation is pure conjecture. Furthermore, our examination of the 2001 legislation does not reveal the reason that the legislature repealed former RCW 72.65.070. It is just as likely that the legislature was attempting to address *Hall*, 104 Wn.2d at 493, which held that differences between the mens rea elements of first degree escape and willful failure to return to a work release facility violated equal protection, by ensuring that the same mens rea requirements and the same affirmative defenses applied to both general escape and willful failure to return to a work release facility.

Arguing that this sentencing disparity was a legislative oversight, McPherson relies on *State v. Berrier*, in which we held that applying a firearm sentence enhancement to a defendant's conviction for unlawful possession of a short-barreled shotgun violated equal protection when similarly situated persons convicted of possessing a machine gun under the same criminal statute were not similarly subject to firearm sentence enhancements. 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002). We concluded that (1) the legislative "purpose of exempting certain crimes from the firearm sentence enhancements . . . appears to be that the possession or use of a firearm is a necessary element of the underlying crime itself"; (2) applying that exception to possessing a machine gun, but not to possession of a short-barreled shotgun, did not further that purpose because "possession [was] a necessary element of the underlying crime in both cases"; and (3) the "most plausible explanation for the distinction" at issue was "legislative oversight." *Berrier*, 110 Wn. App. at 650-51.

But *Berrier*'s analysis is specific to the legislative purpose of the firearm sentence enhancements. *Berrier* is not, therefore, dispositive of the issue here—whether there is a rational basis for distinguishing sentencing classifications between felon and misdemeanant escapees. Unlike in *Berrier*, we cannot conclude that the sentencing distinction at issue here was a mere legislative oversight.

Until 1987, former RCW 9.94A.360(13) (1986)[10] provided in part:

> If the present conviction is for escape (Escape 1, RCW 9A.76.110, Escape 2, RCW 9A.76.120, Willful Failure to Return from Furlough, [former] RCW 72.66.060 [(1971)], and Willful Failure to Return from Work Release, [former]

[10] In 2001, the legislature recodified former RCW 9.94A.360 as RCW 9.94A.525. Laws of 2001, ch. 10 § 6.

RCW 72.65.070), count only prior escape convictions in the offender score.

In 1987, the legislature specifically amended former RCW 9.94A.360(13) to create a new subsection (14), which provided that *all* adult prior convictions count toward a defendant's offender score when the defendant's present conviction is for first or second degree escape. Laws of 1987, ch. 456 § 4.

But the legislature did not otherwise amend subsection (13), which continued to provide that only prior *escape* convictions count toward a defendant's offender score when the defendant's present conviction is for willful failure to return from furlough or work release. Laws of 1987, ch. 456 § 4. Because the work-release-failure-to-return statute (former RCW 72.65.070) expressly applied to DOC "prisoners" only,[11] we must presume that the legislature was aware that only felons who failed to return from work release would benefit from subsection (13). *In re Det. of Boynton*, 152 Wn. App. 442, 453, 216 P.3d 1089 (2009) ("We presume the legislature is aware of other statutory provisions when enacting and amending statutes.") (citing *In re Marriage of Little*, 96 Wn.2d 183, 189-90, 634 P.2d 498 (1981)).

Holding that McPherson has failed to establish an equal protection violation under the Fourteenth Amendment to the United States Constitution, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[11] *See* RCW 72.65.010(4), which provides: "'Prisoner' shall mean a person either male or female, *convicted of a felony* and sentenced by the superior court to a term of confinement and treatment in a state correctional institution under the jurisdiction of [the DOC]." (Emphasis added.).

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.